NO. 84-76

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IN THE

Supreme Court of the United States

October Term, 1984

NELL HUNTER, Et Al., Individually, And On Behalf Of All Other Members of Boards of Registrars In The State Of Alabama,

Appellants,

vs.

VICTOR UNDERWOOD And CARMEN EDWARDS, For Themselves And All Others Similarly Situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

Did the court of appeals err in holding that Section 182 of the 1901 Alabama Constitution was enacted with a racially discriminatory purpose and continues to have a racially discriminatory effect?

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16, hereby move that the judgment of the United States Court of Appeals for the Eleventh Circuit be affirmed on the grounds that the evidence of racial motivation and racial effect of the state constitutional provision at issue is both clear and unchallenged, that the issues raised by the appellants are frivolous, and that the questions are so insubstantial that argument is not warranted.

STATEMENT OF THE CASE

"With the end of Reconstruction, the white citizens of Alabama moved to reassert their once unquestioned political supremacy," and joined the group of eleven states which adopted suffrage restrictions first adopted in 1890 in Mississippi and known as the Second Mississippi Plan. J.S. A-8. "When the Alabama constitu-

tional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally." J.S. A-9. The convention adopted several suffrage provisions, one of which disfranchised persons convicted of certain crimes--section 182 of the Alabama Constitution of 1901.[1] The appellees, Victor Underwood and Carmen Edwards, challenged this provision's disfranchisement for misdemeanors. The challenge was to misdemeanors included either in a list of crimes or under the rubric of involving moral turpitude in the disfranchising provision. Both appellees had been affected by the operation of §182 for each had been convicted of uttering a worthless instrument (writing an insufficient funds check). Underwood had

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1. The text of this section is found at Jurisdictional Statement, 2-3, hereinafter, J.S. ___.

been purged from the the roll of qualified electors by the Jefferson County Board of Registrars and Edwards had not been allowed to register by the Montgomery County Board of Registrars.

Suit was filed in federal district court on June 21, 1978 against the registrars of Jefferson and Montgomery County. The plaintiffs and defendants were both certified as class representatives. J.S. D-2. Five causes of action were presented. The only one which was ruled on by the court of appeals and presented for review here, is the claim that section 182 was specifically adopted to disfranchise blacks on account of race and has had and continues to have that effect.[2]

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2. The complaint also alleged that the fundamental right to vote on an equal basis with other citizens was being denied

The evidence showed that the 1901 suffrage provisions were racially motivated and that they had a disparate impact in 1903 and in the four year period prior to filing suit--1974-78.

The evidence presented by the defendant registrars was basically the same as plaintiffs. They defended the case on the theory that the 1901 suffrage provisions were valid because they were passed "with the purpose to disfranchise poor whites equally with blacks." J.S. 17.

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without a compelling state interest, that the disfranchisement provisions were a discriminatory denial of equal protection, and that the moral turpitude provision was vague and indefinite. The complaint was later amended to allege that the suffrage provisions of the 1901 constitution violated the Act of Readmission, Act of June 25, 1868, ch. 70, 15 Stat. 74. The district court ruled against plaintiffs on all causes of action, and all were properly presented and argued to the court of appeals. Plaintiffs, appellees here, contend that the record supports their claims on all causes of action, and would rely upon all claims as alternative grounds to support the judgment of the court of appeals.

The district court found the suffrage provisions constitutional. First, it said, "[t]here is simply nothing in the legislative history to lead one to decide that the provisions disenfranchising those convicted of crimes are based upon the racism present at the constitutional convention." J.S. E-5. It also concluded that the state had a valid state interest in disfranchising those convicted of violating its laws, and then concluded that if a state enactment has a dual motivation, "an impermissible legislative motive standing alone will not invalidate legislation for which there is a permissible basis." J.S. E-5. The district court made no findings on racial effect.

The court of appeals reversed, finding that the district court had "brought its inquiry to a premature end." J.S. A-6. To the district court, the presence of a permissible motive ended

the inquiry. The court of appeals stated that the law is "that the existence of an illicit legislative motive does not automatically result in a conclusion of unconstitutionality." J.S. A-7, n. 7 (emphasis in original). The court of appeals correctly applied the appropriate legal standard as set out in this Court's decisions.

First, it held that for plaintiffs to establish a successful fourteenth amendment claim in matters affecting the elective franchise, they must establish an intent to abridge the franchise on account of race, citing City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion), and Washington v. Davis, 426 U.S. 229 (1976). If mixed motives are involved, defendants must prove by a preponderance of the evidence that the same decision would have been made had the impermissible purpose not been considered, citing Village of Arlington Heights v. Metropol-

itan Housing Development Corp., 429 U.S. 252 (1977), and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). It then held that in matters involving discrimination on the basis of race, the permissible motivating interest articulated by the state must be compelling, citing Crawford v. Board of Education, 458 U.S. 527 (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further, citing Kramer v. Union Free School District, 395 U.S. 621 (1969). J.S. A-5, A-6.

Turning to the case at hand, the court of appeals made a thorough review of the record showing the motivation for both the entire convention and the suffrage provisions in particular, noting that the expert witnesses for both sides testified that these motivations must be viewed as a whole. Relying upon official proceedings

of the convention introduced into evidence, scholarly works,[3] the testimony of experts for both sides and other exhibits, the court of appeals found the racial motivation clear.

The end of Reconstruction opened the way for "the white citizens of Alabama...to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South." J.S. A-8. With the rise of populism in the 1890s the black vote had acquired added leverage. Ibid. The court of appeals, in part relying upon the decision of United States v. Alabama, 252

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3. C. Woodward, Origins of the New South 1877-1913 (1971); S. Hackney, Populism to Progressivism in Alabama (1969); M. McMillan, Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism (1955); and J. Kousser, The Shaping of Southern Politics (1974).

F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court), found that "[w]hites, Democrats and Populists alike, vied for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud." Both courts below agreed that the turn of the century conventions were spurred on by a concern of federal intervention, J.S. A-8, E-3, especially by the narrow defeat of the Lodge force bill in the Senate in 1890, which called for tighter federal control of all phases of voting, from registration to ballot tabulation. The most effective way to avoid federal intervention, the reformers believed, was to eliminate the Negro vote. According to the court of appeals:

> In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes."...

> When the Alabama constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:
>
> > And what is it that we want to do? Why it is[,] within the limits imposed by the Federal Constitution, to establish white supremacy in this State.
>
> 1 Official Proceedings [of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901] at 8;... In Knox' words, "if we would have white supremacy, we must establish it by law--not by force or fraud." I Official Proceedings at 9.

J.S. A-9.

The court of appeals found that the suffrage committee, borrowing from the successful methods of the Second Mississippi Plan and those of other states, sought to achieve the convention's objective "by setting on devices that would subvert the guarantees of the fourteenth amendment without directly provoking a legal challenge." J.S. A-9. Multiple devices were adopted because of a concern

that one or more of the methods might be held invalid. The court of appeals noted that this was a well-founded fear, for a grandfather clause similar to Alabama's was struck down in Guinn v. United States, 238 U.S. 347 (1915) and Alabama's poll tax was held unconstitutional in United States v. Alabama, 252 F. Supp 95 (M.D. Ala. 1966) (three-judge court). J.S. A-10, ns. 9 and 10.

While there was scant record in the debates over the adoption of section 182, the court of appeals found the source of the crimes included and excluded in the section shed light on the motives of the drafters.

> The crimes selected by the suffrage committee had their origin in an ordinance drafted and submitted by John Fielding Burns, a Black Belt planter. See I Official Proceedings at 511. According to Dr. McMillan:
>
> > [t]he crimes [Burns] listed were those he had taken cognizance of for years in his justice of the peace

> court in the Burnsville district, where nearly all his cases involved Negroes. For example, among those [Burns would have] disfranchised were persons guilty of larceny, bigamy, seduction, incest, rape, or attempt to rape, burglary, or attempt to burglarize, vagrancy, wife beating, forgery and "those who are bastards or loafers or who may be infected with any loathsome or contagious disease."
>
> M. McMillan, supra, at 275 n. 76. In newspaper accounts, "Burns estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." J. Gross, Alabama Politics and the Negro, 1874-1901 244 (1969) (cited in Pl. Exh. 9).

J.S. A-10, A-11.

The court of appeals also found that according to the experts for both sides, "the evident racial animus of section 182 was used to induce delegates representing poor whites to vote for other provisions in the suffrage article, such as the poll tax, that were contrary to their interests." J.S. A-11.

The court found that the "[p]laintiffs have more than shouldered their burden of showing that racially dis-

criminatory intent was a motivating factor in the adoption of section 182," and that the registrars conceded the point in their brief. J.S. A-11 and n. 12. The registrars repeat that concession in their jurisdictional statement, arguing that "the entire suffrage article had the intention to disenfranchize poor whites equally as well as blacks." J.S. 10. (Emphasis theirs.)

The evidence showed that section 182 had a racially discriminatory impact at the time of adoption and currently. According to the defendants' expert witness, Dr. J. Mills Thornton, who had reviewed statistics regarding the race of those incarcerated in 1901, section 182 had disfranchised more than 12,000 blacks and about 1,000 whites. See transcript of July 21, 1981, 78-79. Appellees also introduced analyses of the Montgomery and Jefferson County registrars' records of

persons purged from the roll of voters because of convictions covered by section 182. No evidence was offered by the registrars on this issue. The court of appeals found that the intended racial effect continued to the present:

> [The convention delegates'] perception of the disparate impact of section 182 turned out to be correct. The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of non-prison offenses.

J.S. A-11.

Having found the record clearly established both a racially discriminatory motivation and impact, the court of appeals turned to "the state's burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration." J.S. A-11, A-12. The registrars argued that

the state had an interest in denying the franchise to those convicted of violating its laws, but the court of appeals concluded that it was "unable to discern any evidence that the rule was actually intended to serve that interest." J.S. A-12.

The court of appeals noted that there were glaring omissions in the disfranchisement provision, serious offenses being omitted, indicating an inconsistency with the theory that a "good government" purpose lie behind the law. But beyond that, the court said, there was nothing in the convention proceedings or the constitution itself to suggest a good government purpose. J.S. A-12.

> Indeed, while it is true that the avowed objective of the suffrage committee was to deny the vote to the corrupt and the ignorant, see I Official Proceedings at 1257, defendants' expert freely admitted under cross-examination that the phrase the "corrupt and the ignorant" referred

specifically to blacks and lower-class whites.

J.S. A-13.[4]

The court of appeals had no need to reach the balancing test of Arlington Heights to determine if section 182 would have been adopted in the absence of the racially discriminatory motive, because it found that there had been no permissible

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4. The court of appeals also rejected the state's argument that a state supreme court decision, Washington v. State, 75 Ala. 583 (1884) provided a legitimate state interest for the convention in 1901. That decision, seventeen years prior to the convention, held that disfranchisement of those convicted of crimes involving moral turpitude was within the state's right to protect the integrity of the vote. The state argued that most convention delegates were lawyers and therefore must have been aware of that decision. The court of appeals found this theory of causation too attenuated, and also ruled that when fundamental rights are at issue, it is up to the state to prove its motivations, it being impermissible for a court to speculate as to what permissible state motives might exist, citing Scheinberg v. Smith, 659 F.2d 476, 483 n. 2 (5th Cir. Unit B 1981). J.S. A-13, n. 14.

motive established in the record.[5] "There was no evidence from which the district court could have found that section 182 would have been adopted had a permissible reason been the sole consideration." J.S. A-13. It concluded that there was nothing present which could "render immune a purposefully discriminatory scheme whose invidious effects still reverberate today," and reversed and remanded. J.S. A-13, A-14.

The appellants unsuccessfully sought a stay of the mandate from the court of

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5. The court of appeals noted that it was the appellants' position that the first prong of Arlington Heights had not been proved because the delegates also intended to disfranchise lower class whites, a view it rejected as an "erroneous reading of the law." J.S. A-11, 12. In effect this is an argument that the presence of a permissible motive negates the existence of an impermissible motive. The court of appeals also stated that "[t]he registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of Arlington Heights. Ibid.

appeals, from Justice Powell, and sought to have the district court delay entering injunctive relief. On June 12, 1984, the district court entered an order enjoining all registrars in Alabama from enforcing section 182 insofar as it applies to misdemeanors.

Summary of Argument

Once the plaintiffs proved that section 182 of the Alabama Constitution of 1901 was intended to discriminate against blacks and had the intended effect, they established a prima facie violation of the fourteenth amendment.

It order to rebut that showing, the state had the burden of establishing that its restriction of the elective franchise served a compelling state interest by the least restrictive means available, and would have been adopted without regard to the racially discriminatory motive.

Neither the tenth nor the fourteenth amendment provides the state the authority to discriminate on the basis of race regarding the elective franchise.

The registrars defended the case on an incorrect view of the law. They believed that any permissible motive for adopting section 182 would automatically vitiate any discriminatory motive, and that an attendant intent to discriminate against poor whites cancelled out, in effect, the intent to discriminate against blacks.

The court of appeals correctly held that the registrars failed to establish that there was any legitimate reason for adopting section 182, and that the proof of racially discriminatory purpose and effect rendered it violative of the fourteenth amendment.

Argument

Section 182 Was Adopted With The Intent, And Has Had The Effect, Of Disfranchising Proportionately More Blacks Than Whites.

This case presents a fairly simple issue. The appellant registrars argue that even though the 1901 constitutional convention adopted the petty crimes provision for the purpose of disfranchising substantially all blacks, the provision does not violate the equal protection clause of the fourteenth amendment because there was also an intent to disfranchise some whites, i.e., poor whites. Their defense has no merit because (a) what is being infringed involves both race and the elective franchise and (b) discrimination against poor whites would not stand up under scrutiny as a compelling state interest.

The evidence showed, and the court of appeals so found, that the intent to discriminate against black persons by the

adoption of section 182 was clear. Given the historical record established by appellees, it cannot be said that the court of appeals was in error in finding a clear intent to discriminate, and appellants do not contend otherwise. Indeed, the element of intent, while necessary to establish a fourteenth amendment claim, was never really in dispute in this litigation and it is not an issue before this Court. The appellants adhere to their previous position in their argument for review--"the entire suffrage article had the intention to disenfranchise poor whites equally as well as blacks." J.S. 10. (Emphasis theirs.)

The evidence also showed, and the court of appeals so found, that section 182 had the intended discriminatory effect by 1903 and continues to have that effect today. J.S. A-11. Again, the appellants do not contend otherwise. Their defense

has always been concerned only with motives. The stark disparate racial impact remains unchallenged.

The court of appeals explicitly found that appellees had established a prima facie case: "In reviewing this record we are left with a firm and definite impression of error by the court below with respect to the issue of intent. Plaintiffs have more than shouldered their burden of showing that discriminatory intent was a motivating factor in the adoption of section 182..." J.S. A-11.[6] Having shown that appellees were denied the right to participate in elections on an equal basis with other citizens of the jurisdiction, they established a violation

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6. In so reversing the finding of the district court, the court of appeals used the test appropriate to reversing a finding of fact as clearly erroneous under Rule 52, F.R.Civ.P., United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See also, J.S. A-6.

of a constitutionally protected right, Dunn v. Blumstein, 405 U.S. 330, 336 (1972) a "'fundamental political right,... preservative of all rights.'" Reynolds v. Sims, 377 U.S. 533, 562 (1964). Before this right can be restricted, "the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." Evans v. Cornman, 398 U.S. 419, 422 (1970). To restrict the elective franchise, the state must demonstrate that the restriction is "necessary to promote a compelling governmental interest," and "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' Shelton v. Tucker, 364 U.S. 479, 488 (1960)," Dunn v. Blumstein, at 342, 343.

The state has to establish one other evidentiary element in a case such as this where the intent to discriminate in the right to the elective franchise has been prima facie established. It was required to show by a preponderance of the evidence that, if it had a permissible motive in adopting the restriction, the restriction would have been adopted even in the absence of the discriminatory motive. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). The court of appeals correctly held the state to this standard. J.S. A-5 to A-7.

The existence of a compelling state interest, i.e., a permissible motive, is not a matter for conjecture or theory by the state's lawyers. It must be one actually held by the state as evidenced by an authoritative state body, either the legislature or the state court. The court of appeals so held, J.S. A-13, n. 14, and

this holding conforms to the holding of Sherbert v. Verner, 374 U.S. 398, 407 (1963).[7]

The registrars here argue that there were, in addition to racial motives, two non-racial reasons for adopting section 182--to disfranchise poor whites and to deny the franchise to those convicted of violating its laws. Quite apart from the tautology that discrimination aimed at all blacks and some whites remains discrim-

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7. In Sherbert v. Verner, 374 U.S. 398, 407 (1963), this Court refused even to assess a proffered justification for infringment of first amendment rights because it had not been made to the state supreme court. The opinion went on to state "there is no proof whatever to warrant such fears...as those which the respondents now advance [and] it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Cf., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 470 (1981) (legislative purpose had been presented to and accepted by the highest court of the state) (plurality opinion).

ination against blacks, discrimination in the entitlement to the elective franchise (in other than elections of special interest because of wealth) must serve a compelling state interest, Hill v. Stone, 421 U.S. 289, 298 (1975). The registrars have not as yet articulated what compelling state interest it is which is served by disfranchising poor whites, and none is readily apparent.[8]

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8. It is not at all clear that the registrars are actually arguing that disfranchising poor whites is a permissible reason for adoption of section 182. They have consistently argued that the presence of this motive negates the finding that there was racial motivation under the first prong of Arlington Heights. The court of appeals acknowledged, and rejected this argument, and pointed out that "[t]he registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of Arlington Heights." J.S. A-11, n. 12. The registrars take exception to this statement of the court of appeals. J.S. 17. They argue that "the State demonstrated that section 182 would have passed even in the absence of

The latter interest claimed might fit a category this Court has described as "a formidable-sounding state interest." Dunn v. Blumstein, at 345. But like the officials in Dunn, the registrars here simply did not prove their defense. The court of appeals found no evidence in the record that the Convention intended any "good government" reasons for the expansion of the list of disfranchising crimes. J.S. A-12.

The registrars argue that Washington v. State, 75 Ala. 582 (1884), provides a "good government" rationale. This argument is faulty for several reasons. First, there is no record that anyone mentioned Washington v. State in the debates of 1901, while schemes to disfranchise blacks were openly discussed. J.S. A-13,

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any alleged racial motive." Ibid. They apparently view discrimination aimed at poor whites and all blacks as a non-racial motive, but are unwilling to actually argue that this is a permissible motive.

n. 14. Second, as the court of appeals noted, a "good government" rationale is undercut by the omission of misdemeanors relatively more serious than writing a bad check, e.g., second degree manslaughter, assault on a police office, assault and battery, mailing pornography, and aiding the escape of a misdemeanant. J.S. A-12, n. 13. Third, as the court of appeals found, the registrars' expert witness freely admitted that in the convention debates, the phase the "corrupt and the ignorant" referred to blacks and lower class whites. J.S. A-13.

The registrars argue that the tenth amendment leaves the states an unfettered hand in the regulation of the elective franchise, quoting a sentence from Kusper v. Pontikes, 414 U.S. 51, 57 (1973). J.S. 11, 12. Kusper did not so hold, and the sentence from that opinion immediately following the appellants' quote makes that

clear: "[I]n exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." 414 U.S. at 57. Likewise the registrars' reliance upon Richardson v. Ramirez, 418 U.S. 24 (1974) avails them nothing, for whatever the power of states to disfranchise persons convicted of crimes, they cannot discriminate on the basis of race in the exercise of that power.

The court of appeals was correct in rejecting the defenses suggested by the registrars. The registrars simply defended section 182 under an erroneous view of the law. They believed that the existence of any allegedly non-racial motive attendant to a conceded racial motive would sustain the constitutionality of section 182. The court of appeals thoroughly examined the record to find any

basis for the registrars' defenses. J.S. A-11 to A-13. This examination revealed no evidence either that a permissible motive existed for the adoption of section 182 or that section 182 would have been adopted in the absence of the racially discriminatory motive.

Conclusion

The decision below should be affirmed because the court of appeals followed the appropriate analysis under precedents of this Court and its judgment is completely supported by the evidence and the law. For the reasons stated above, appellees respectfully request that this Court summarily affirm the judgment of the court of appeals without the necessity of any further argument. No substantial question has been presented.

Respectfully submitted,

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